Supreme Court, U. S.
FILED
AUG 31 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-48

JOSEPH B. WALLES,

Petitioner,

v.

BECHTEL CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

MEMORANDUM IN OPPOSITION FOR RESPONDENTS INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCALS 405 AND 716

LAURENCE J. COHEN
RICHARD M. RESNICK
1125 Fifteenth Street, N.W.
Suite 801
Washington, D.C. 20005

Of Counsel:
SHERMAN, DUNN, COHEN & LEIFER
1125 Fifteenth Street, N.W.
Suite 801
Washington, D.C. 20005

3 3 PRINTED IN U.S.A.

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-48

JOSEPH B. WALLES,

Petitioner,

v.

BECHTEL CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

MEMORANDUM IN OPPOSITION FOR RESPONDENTS INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCALS 405 AND 716

The opinion of the Supreme Court of Iowa, the basis of this Court's jurisdiction, the question presented, the Constitutional and statutory provisions involved, and the statement of the case are set out at pp. 1-4, 1a-15a and 1c-4c of the Petition.

ARGUMENT

1. The Iowa Supreme Court held:

> "If plaintiff's allegation is that defendants maintained a 'closed shop' agreement, the NLRB has exclusive jurisdiction to deal with plaintiff's claim. On the other hand, if plaintiff's claim is based upon the alleged existence of a 'union shop' or some other less onerous union security agreement, a state court has jurisdiction to hear plaintiff's claim for relief based

upon alleged violations of a right-to-work law." (Pet. App. 8a.)[1]

In its view, that holding following directly from this Court's decisions in *San Diego Unions* v. *Garmon*, 359 U.S. 236, *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, and *Oil Workers* v. *Mobil Oil Corp.*, 426 U.S. 407.

We do not see how the Iowa Supreme Court's holding, or the reasoning on which it rests, can be disputed. Moreover, so far as we are aware, or as petitioner alleges, there is no contrary decision, federal or state. The petition should, therefore, be denied.

2. The *Garmon* rule is that:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." (359 U.S. at 244.)

For, as Mr. Justice Frankfurter explained:

> "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. • • • [T]o allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." (*Id.*)

There can, of course, be no doubt that, since 1947, one aspect of the "national regulation" imposed by the NLRA is the prohibition of the closed shop. As this Court noted in *Mobil Oil*, its most recent decision on the Act's regula-

[1] Since the complaint alleged the maintenance of a closed shop agreement (Pet. 2), that court dismissed the complaint for lack of jurisdiction.

tion of union security provisions (albeit one not cited or discussed in the petition):

> "Under § 8(3) of the Wagner Act, enacted in 1935, closed shops, union shops, and agency shops were all permitted. But in 1947, in § 8(a)(3), as added by the Taft-Hartley Act, Congress reacted to widespread abuses of closed-shop agreements by banning such arrangements [footnote omitted]. Union and agency shops were still permitted, however, by § 8(a)(3)." (426 U.S. at 414.)[2]

"[I]n stark contrast" (*Id.* at 415) to this absolute federal prohibition of the closed shop, the federal permission for the union and agency shops may, as § 14(b) makes explicit, be overridden by the states:

> "While § 8(a)(3) articulates a national policy that *certain union-security agreements* are valid as a matter of federal law, § 14(b) reflects Congress' decision that any State or Territory that wishes to may exempt itself from *that policy*. Section 14(b) allows a State or Territory to ban agreements 'requiring membership in a labor organization as a condition of employment'

[2] The Court explained the distinctions between these three forms of union security agreements as follows:

> "A 'union shop' agreement provides that no one will be employed who does not join the union within a short time after being hired. An 'agency shop' agreement generally provides that while employees do not have to join the union, they are required—usually after 30 days—to pay the union a sum equal to the union initiation fee and are obligated as well to make periodic payments to the union equal to the union dues. See *NLRB* v. *General Motors Corp.*, 373 US 734 (1963). The 'union shop' and 'agency shop' varieties of 'union security' agreements are to be distinguished from the 'closed shop' agreement, barred by § 8(a)(3), which provides that the employer will hire no one who is not a member of the union at the time of hiring." (*Id.* at 409, n. 1.)

[footnote omitted]. We have recognized that with respect to those state laws which § 14(b) permits to be exempted from § 8(a)(3)'s national policy '[t]here is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws. . . .' *Retail Clerks* v. *Schermerhorn,* 375 U.S. 96, 103 (1963). * * * As its language reflects, § 14(b) was designed to make clear that § 8(a)(3) left the States free to pursue 'their own more restrictive policies in the matter of union-security agreements.' *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U.S. 301, 314 (1949)." (*Id.* at 416-417. Emphasis added.)[3]

In short, as this Court stated: "[s]ince § 8(a)(3) already prohibits the closed shop," whose distinguishing feature is that union membership is required at the hiring stage and thereafter, "the more restrictive policies that § 14(b) allows the States to enact relate not to the hiring process," *viz.,* not to closed shop agreements, "but rather to conditions that would come into effect only *after* an individual is hired," *viz.,* to union and agency shop agreements whose distinguishing feature is that in the period beginning 30

[3] The dispute between the *Mobil Oil* majority and Justices Stewart and Rehnquist, dissenting, concerned the proper method "for determining whose law should prevail in a multi-jurisdictional situation." (426 U.S. at 428; Stewart, J. dissenting.) The dissenting opinion's summary of the purpose and scope of § 14(b) parallels that of the majority:

> "To summarize, §§ 8(a)(3) and 14(b) together exhaust the federal interest in the types of union-security agreements employers and unions may make. *The closed shop is absolutely prohibited. And any lesser security arrangement, though consistent with the federal interest, is sanctioned only if it harmonizes with state policy.*" (*Id.* at 427; Stewart, J. dissenting. Emphasis added.)

days after hire payment of union dues or agency shop fees is required. (*Id.* at 417.)

Thus, the Iowa Supreme Court's holding is but a restatement of this Court's demarcation of the area reserved to the NLRB congruent with the uniform federal rule prohibiting the closed shop, and the area open to the States congruent with the rules regulating the union and agency shops as to which "Congress chose to abandon any search for uniformity * * * and decided to suffer a medley of attitudes and philosophies." (*Schermerhorn,* 375 U.S. at 104-105.)

3. As we have just demonstrated, this Court's decisions refute petitioner's argument (Pet. 4-5) that the Iowa Supreme Court's decision is inconsistent with § 14(b)'s language. And, contrary to petitioner's suggestion (Pet. 5-8), those decisions faithfully reflect the Congressional intent. The complex consisting of § 8(a)(3), its provisos and § 14(b) is the product of the Conference Committee that resolved the differences between the House and Senate bills. As the House Conference Report stated:

> "Neither the so-called 'closed shop' proviso in section 8(3) of the existing act nor the union shop and maintenance of membership proviso in section 8(a)(3) of the conference agreement could be said to *authorize* arrangements of this sort in States where such arrangements were *contrary to the State policy.* To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a provision having the same effect." (H. Conf. Rep. No. 510, on HR 3020, 80th Cong., 1st Sess. 60. Emphasis added.)[4]

[4] This critical distinction, with respect to the reach of § 14(b),

Thus, the authoritative Conference Report confirms that Congress did not intend to grant the states authority to duplicate the Act's prohibition of the closed shop, but rather, intended to grant the states authority only to prohibit the execution or application of union security agreements which are otherwise *permitted* by federal law.

---

between the closed shop on the one hand and union and agency shops on the other, was recognized by this Court in *Mobil Oil* when it noted "the House's intent that agreements providing for *agency or union shops* would be valid 'only if they are valid under the laws of any State in which they are to be performed.'" (*Id.* at 418. Emphasis added.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LAURENCE J. COHEN
RICHARD M. RESNICK
1125 Fifteenth Street, N.W.
Suite 801
Washington, D.C. 20005

Of Counsel:
SHERMAN, DUNN, COHEN & LEIFER
1125 Fifteenth Street, N.W.
Suite 801
Washington, D.C. 20005

August 31, 1977